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9 Counsel for Defendants,
10 Affymax, Inc., John A. Orwin, Robert F.
Venteicher, Jeffrey H. Knapp, Anne-Marie
Duliege, Herb Cross, Kathleen Laporte, Ted
W. Love, Daniel K. Spiegelman, John P.
Walker, Christine Van Heek, Keith R. Leonard,
Jr., And Hollings C. Renton
11
12

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

16 CHRIS MISIALEK, Derivatively On
17 Behalf Of AFFYMAX, INC.

18 Plaintiff,

19 v.

20 JOHN A. ORWIN, ROBERT F.
VENTEICHER, JEFFREY H. KNAPP,
21 ANNE-MARIE DULIEGE, HERB CROSS,
KATHLEEN LAPORTE, TED W. LOVE,
22 DANIEL K. SPIEGELMAN, JOHN P.
WALKER, CHRISTINE VAN HEEK,
KEITH R. LEONARD, JR., and
23 HOLLINGS C. RENTON,
24

Defendants,
25 -and-

26 AFFYMAX, INC., a Delaware corporation,
27 Nominal Defendant.
28

Case No. 5:13-cv-03832-LHK

**STIPULATION AND [PROPOSED]
ORDER TO STAY ACTION**

Judge: Hon. Lucy H. Koh

1 WHEREAS, on August 19, 2013, Plaintiff Chris Misialek filed the Shareholder Derivative
 2 Complaint for Contribution, Breach of Fiduciary Duty, Waste of Corporate Assets, and Unjust
 3 Enrichment (the “Complaint”) asserting claims derivatively on behalf of nominal defendant
 4 Affymax, Inc. (“Affymax” or the “Company”) against certain officers and directors of the
 5 Company;

6 WHEREAS, counsel for nominal defendant Affymax and the individual defendants John
 7 A. Orwin, Robert F. Venteicher, Jeffrey H. Knapp, Anne-Marie Duliege, Herb Cross, Kathleen
 8 Laporte, Ted W. Love, Daniel K. Spiegelman, John P. Walker, Christine Van Heek, Keith R.
 9 Leonard, Jr., and Hollings C. Renton (collectively, “Defendants”) executed waivers of the service
 10 of summons and complaint in this action (the “Federal Derivative Action”);

11 WHEREAS, currently, Defendants must answer or otherwise respond to the Complaint on
 12 or before October 22, 2013;

13 WHEREAS, there is a securities fraud class action pending before the U.S. District Court
 14 for the Northern District of California (“District Court”) captioned *Bartelt v. Affymax, Inc., et al.*,
 15 Case No. 3:13-cv-01025-WHO (the “Securities Class Action”) asserting federal claims arising
 16 from facts common to this action;

17 WHEREAS, defendants in the Securities Class Action filed a motion to dismiss the
 18 securities fraud class action complaint on September 20, 2013;

19 WHEREAS, a related shareholder derivative action styled *In re Affymax, Inc. Shareholder*
 20 *Derivative Litigation*, Lead Case No. 113CV24359, is pending before the Superior Court of the
 21 State of California, County of Santa Clara (the “State Derivative Action”);

22 WHEREAS, the State Derivative Action has been stayed pending the entry of an order
 23 finally disposing the motion to dismiss in the Securities Class Action;

24 WHEREAS, without waiving any rights or positions of any party, a ruling on the motion
 25 to dismiss in the Securities Class Action could affect the resolution of this Federal Derivative
 26 Action;

27 WHEREAS, if this Federal Derivative Action is not stayed, Defendants intend to file
 28 motions based on Plaintiff’s failure to make a “demand” and other issues which would be time

1 consuming for the parties and the Court and Plaintiff intends to file oppositions to any such
 2 motions; and

3 WHEREAS, the parties have met and conferred and have reached agreement that a stay of
 4 this Federal Derivative Action is warranted based on the facts and circumstances and
 5 considerations of judicial economy and efficiency, as set forth below.

6 **NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED**, by and among
 7 the undersigned counsel for the parties, that:

8 1. This Derivative Action is stayed until the earlier of the following occurs: (a) after
 9 an order is entered in the defendants' motion to dismiss in the Securities Class Action; or (b) the
 10 defendants file an answer in the Securities Class Action;

11 2. Defendants need not answer, move or otherwise respond to the Complaint while
 12 the stay is in place. Upon expiration of the stay, the parties to this Federal Derivative Action shall
 13 meet and confer regarding whether the stay should remain in place or should be lifted, and shall
 14 present agreement, or their respective views, to the Court. Upon expiration of this stay, no
 15 defendant shall have to respond to the Complaint until a new response date is set and/or approved
 16 by the Court;

17 3. This Stipulation shall not preclude or prevent the parties from stipulating to, or
 18 filing a motion seeking a court order lifting, modifying or extending the terms of this Stipulation
 19 upon a showing of good cause.

20 **IT IS SO STIPULATED.**

21 DATED: October 9, 2013

FINKELSTEIN THOMPSON LLP

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 23 Rosemary M. Rivas

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12 jplace@finkelsteinthompson

13 Counsel for Plaintiff, *Chris Misialek*

14 DATED: October 9, 2013

15 COOLEY LLP

16 By: /s/ Jeffrey M. Kaban
17 Jeffrey M. Kaban

18 John C. Dwyer (136533)
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32 *Duliege, Herb Cross, Kathleen Laporte, Ted W.*
33 *Love, Daniel K. Spiegelman, John P. Walker,*
34 *Christine Van Heek, Keith R. Leonard, Jr., and*
35 *Hollings C. Renton*

1
2 **ATTESTATION (CIVIL LOCAL RULE 5-1(i)(3))**

3 In accordance with Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this
4 document has been obtained from the signatory.

5 Dated: October 9, 2013

COOLEY LLP

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7 _____
8 /s/ *Jeffrey M. Kaban*
9 Jeffrey M. Kaban (235743)

10 Attorneys for Defendants
11 *Affymax, Inc., John A. Orwin, Robert F.
Venteicher, Jeffrey H. Knapp, Anne-Marie
Duliege, Herb Cross, Kathleen Laporte, Ted W.
Love, Daniel K. Spiegelman, John P. Walker,
Christine Van Heek, Keith R. Leonard, Jr., and
Hollings C. Renton*

12 * * *

1 PURUSANT TO THE STIPULATION, IT IS SO ORDERED.
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3 DATED: _____
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The Honorable Lucy H. Koh
United States District Judge